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July 13, 1995

DOCKET FILE COPY ORIGINAL

Mr. William Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: PR Docket 94-106, Petition of the Connecticut Department of  
Public Utility Control to Retain Regulatory Authority  
Motion to Stay

Dear Mr. Caton:

Please find enclosed for filing an original and four copies of the Motion for Stay of the Connecticut Department of Public Utility Control and Richard Blumenthal, Attorney General of the State of Connecticut.

If there are any questions regarding this matter, please contact the undersigned.

Sincerely yours,

Mark F. Kohler  
Assistant Attorney General

Enc.

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

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**JUL 14 1995**

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In the Matter of :

Petition of the Connecticut Department  
of Public Utility Control to Retain  
Regulatory Control of the Rates of  
Wholesale Cellular Service Providers in  
the State of Connecticut :

PR Docket No. 94-106

July 13, 1995

**DOCKET FILE COPY ORIGINAL**

**MOTION FOR STAY OF THE CONNECTICUT DEPARTMENT OF PUBLIC  
UTILITY CONTROL AND THE ATTORNEY GENERAL OF CONNECTICUT**

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## **I. INTRODUCTION AND SUMMARY**

The Connecticut Department of Public Utility Control (the "DPUC") and Richard Blumenthal, Attorney General of the State of Connecticut (the "Attorney General") (collectively, the "State Movants") hereby request that the Commission stay its order denying the DPUC's petition to retain regulatory authority adopted May 8, 1995 and released May 19, 1995 (the "Order"). The State Movants are filing with the United States Court of Appeals for the Second Circuit a petition for review (a copy of which is attached) of the Order. Pursuant to Fed. R. App. P. 18, which requires that motions for stay ordinarily be made in the first instance with the relevant agency, the State Movants maintain that they are entitled to a stay of the Order pending the resolution of their appeal.

The State Movants are likely to prevail on the merits of their appeal and will suffer irreparable harm in the absence of a stay of the Order. More importantly, the public interest strongly favors the entry of a stay. Under the circumstances, the Commission should stay its Order until the State Movants' appeal is resolved.

## **I. BACKGROUND**

On August 8, 1994, the DPUC filed a petition with the Commission requesting authority to continue regulating the rates of wholesale cellular service providers pursuant to the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act"), 47 U.S.C. § 332. In support of its petition, the DPUC submitted extensive evidence, developed in several days of hearings before the DPUC, demonstrating that in Connecticut market conditions have failed to protect subscribers adequately from unjust and unreasonable rates. In particular, the evidence submitted by the DPUC showed that continued regulation was required to protect consumers

at least until the entry of new competitors into the Connecticut market. The evidence for Connecticut was that such new entrants would not be sufficiently competitive so as to protect consumers for a number of years. Accordingly, the DPUC requested that it retain regulatory authority through October 1, 1997, at the latest.

The Commission denied the petition. It concluded that the DPUC had failed to satisfy the statutory requirement that market conditions fail to protect subscribers adequately from unjust or unreasonable rates. In doing so, however, it employed standards that were markedly different from those it had previously indicated would be applicable to a state's petition and erroneously rejected and distorted the evidence submitted by the DPUC.

**II. THE COMMISSION SHOULD STAY ITS ORDER DENYING THE DPUC'S PETITION PENDING THE RESOLUTION OF THE DPUC'S APPEAL.**

The public interest will be best served by staying the Commission's Order denying the DPUC's petition to retain regulatory authority. The Order is unlawful and unsupported by the record evidence, and the State Movants are likely to prevail on the merits of their appeal of the Order. Moreover, unless a stay is granted, the State Movants will be irreparably harmed as they will essentially lose the relief that they seek in the appeal.

In considering a motion for stay, the Commission must balance the following factors: (1) whether the movants are likely to prevail on the merits; (2) whether the movants will suffer irreparable harm in the absence of a stay; (3) whether other parties will be harmed by granting a stay; and (4) whether the public interest will be served by granting a stay. Cuomo v. United States Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985); Wisconsin Gas Co.

v. FERC, 758 669, 673-74 (D.C. Cir. 1985). Furthermore, “[p]robability of success is inversely proportional to the degree of irreparable injury evidence. A stay may be granted with either a high probability of success and some injury, or vice versa.” Cuomo, 772 F.2d at 974. The State Movants fully satisfy these criteria.

**A. The State Movants Are Likely to Prevail on the Merits of Their Appeal.**

The Commission’s Order denying the DPUC’s petition is fatally flawed, and the State Movants are likely to prevail on appeal. The Commission denied the DPUC’s petition under a standard that it had not previously articulated and that is inconsistent with both the Budget Act and the Commission’s Second Report and Order. The standard under which the Commission decided the DPUC’s petition -- which focused almost exclusively on evidence of a lack of investment by the carriers in CMRS facilities and the future impact on the market by the entry of PCS -- is substantially different from the standard delineated in the Second Report and Order. The Commission’s change in the yardstick by which state petitions would be judged prejudiced the DPUC in that it deprived the DPUC of the opportunity to present the kind of evidence in support of its request to retain rate regulation that would satisfy the new standard. However, the DPUC did make a compelling showing under the standard set forth in the Budget Act and developed in the Second Report and Order. The Commission’s conclusion to the contrary is not supported by the record evidence.

In its Second Report and Order, the Commission defined the nature of the showing that would be expected of a petitioning state. Although the Commission determined that “a state should have the discretion to submit whatever evidence the state believes is persuasive

regarding the market conditions in the state and the lack of protection for CMRS subscribers in the state,” the Commission identified eight “types of evidence, information and analysis” that it deemed to be “pertinent to our examination of market conditions and consumer protection.” Second Report and Order, at ¶ 252. Notably absent from the Commission’s discussion in the Second Report and Order, however, were factors that the Commission in its Order found to be controlling: (1) evidence of a lack of investment or failure to deploy adequately new facilities, technologies and services by CMRS providers, see Order, at ¶ 25; and (2) evidence of future, rather than current, market conditions, see id. ¶ 26.

In denying the DPUC’s petition, the Commission changed the rules of the game. The Commission expressly acknowledged that the eight categories of evidence in the Second Report and Order constituted a “comprehensive list” that “gives states guidance concerning the evidence of structure, conduct, and performance that we would find persuasive in evaluating their petitions.” Order, at ¶ 20. Nevertheless, the Commission went on to identify entirely new factors which it found to be of overriding significance. For the first time, the Commission stated that “a very strong indication that industry conduct and performance are failing to serve consumer interests adequately would be evidence of a lack of investment on the part of licensees in CMRS facilities, of a failure by licensees to deploy adequately new facilities, technologies, and services.” Id. at ¶ 25. The Commission concluded that “an analysis of economic performance must place great weight on reinvestment of profits in this high-growth industry. . . .” Id. (emphasis added). Nowhere in the Commission’s Second Report and Order were states given any indication that this type of evidence would be not just

a factor, but would be accorded great weight by the Commission. Despite having failed to identify this new category of evidence that the Commission now views as a “critical issue,” id. at ¶ 69, the Commission applied this new standard to the DPUC’s petition

Similarly, the Commission for the first time raised to the level of decisional importance the issue of the future, as opposed to current, market conditions. Again absent from the discussion in the Second Report and Order is the Commission’s now apparently definitive assessment of the standards to be applied to states’ petitions that “we will look with disfavor on any petition that fails to consider the immediate and near-term impact of PCS.” Order, at ¶ 21. Furthermore, the Commission concluded in the Decision that “we believe that evidence concerning dynamic factors is a more persuasive market indicator than evidence concerning static factors. Given the rapidly changing nature of the market in which wireless services are provided and the statutory purposes of [the Budget Act], we conclude that evidence of where a market is going is more relevant than evidence of where it has been.” Id. at ¶ 26. Neither the express statutory language of the Budget Act or its legislative history suggests that this inquiry is limited to or should be weighted heavily in favor of future market conditions. The DPUC found that current market conditions do not protect consumers. It also found that it appears that future market conditions will change gradually. While recognizing that continued regulation will not be necessary at some point in the future, the DPUC demonstrated that in the mean time regulation must remain in place. The Commission’s imposition of a standard predicated almost exclusively on future market conditions is

inconsistent with the Budget Act and is contrary to the standards that states were told would govern their petitions.

In addition to having applied the wrong standards, the Commission erred in its findings and grossly distorted the record evidence. In denying the DPUC's petition, the Commission repeatedly emphasized that it considered the impact of PCS as a principal factor for the evaluation of the petition but that the DPUC had failed to consider this factor. See Order, at ¶ 21. However, the record shows that a central focus of the DPUC's pre-petition hearings was the question of the existence of substitutable services, in particular PCS, and the timing of the entry of such competitive services. The DPUC analyzed in detail the current and future impact of PCS and other services. It found, on the basis of the evidence adduced at the hearings and submitted to the Commission in support of the petition, that, at present and for the immediate near-term, there were no substitutable services for CMRS in the Connecticut market. Remarkably, however, the Commission completely ignored the DPUC's analysis and findings on this issue. Instead, the Commission perfunctorily stated that the DPUC failed to address the question of PCS's impact. This conclusion is plainly wrong and cannot be supported by a fair reading of the record.

In addition, the Commission erroneously discounted the DPUC's evidence demonstrating a variety of anti-competitive and discriminatory practices on the part of the cellular carriers, including in particular the use of volume discounts and upside-down pricing, the misuse of confidential marketing information from resellers, and the carriers' relationship with its retail affiliates. The Commission rejected these showings in large part because it



found that either that the DPUC had not taken any remedial actions with regard to these issues or that the various practices were not illegal. These conclusions miss the point. As the DPUC found these various factors contribute significantly to a market that fails to protect subscribers from unreasonable prices.

The Commission concluded that the limited nature of the DPUC's regulatory oversight of cellular demonstrates a lack of need for continued rate regulation. In essence, the Commission has suggested that because the DPUC has not heavily regulated the cellular industry in Connecticut, there must be no reason for any regulation. For example, the Commission made much of the fact that rates in Connecticut have declined. See Order, at ¶¶ 69, 76. It concluded that these rate decreases were entirely carrier-initiated, implicitly suggesting that market conditions are therefore protective of consumers. The Commission further found fault with the DPUC for not have undertaken any proceedings to requiring reductions or structural changes in the carriers' rates and noted the carriers' "voluntary" corrective actions relating to confidential information from resellers. See id. at ¶¶ 68, 70, 72-73.

This portrayal of Connecticut's regulatory history is torn completely out of its context. The decreases in the carriers' rates and other "voluntary" actions by the carriers have been coincident with investigations conducted by the DPUC. Although "carrier-initiated," these actions were not the result of market conditions that are sufficiently competitive to protect consumers. Rather, the carriers plainly "initiated" the rate decreases to influence the DPUC's decision whether to continue regulation of rates. Furthermore, the mere fact that the DPUC

chose not to conduct potentially burdensome rate proceedings is not tantamount to some kind of waiver or an admission reflecting a lack of need for a level of regulatory oversight. The DPUC has sought to balance the competing interests of protecting consumers and promoting the development of the industry by maintaining a light-handed approach to cellular regulation. The evidence demonstrates that the DPUC has been successful in achieving the balance it has sought in adopting a light-handed form of regulation.

Similarly, the Commission ignored the DPUC's evidence of anti-competitive practices on the ground that the practices cited were not illegal. Whether the particular structure of the carriers' relationships with their affiliates, for example, is illegal is not the point. The question that remains, and which the DPUC's evidence answered affirmatively, is given the nature of the affiliate relationships, is continued regulation necessary to provide adequate protection to consumers. The Commission thus erred in rejecting out-of-hand the DPUC's showing.

Given the failure to employ the proper standards, the erroneous conclusions regarding the DPUC's showing that market conditions do not adequately protect consumers, and the overall distortion of the record evidence submitted by the DPUC in support of its petition, the State Movants are likely to prevail on the merits of their appeal. A stay of the Order is therefore justified.

**B. The State Movants Will Suffer Irreparable Harm, Others Will Not Be Harmed, and the Public Interest Favors a Stay.**

In its petition, the DPUC sought a limited retention of regulatory authority. It requested that it be permitted to retain authority to regulate wholesale rates until July, 1996, at

which time it would review Connecticut market conditions, and if it found that conditions continued to be inadequate to protect consumers, it sought additional authority until October, 1997. In the absence of a stay, rates would be unregulated during the pendency of the appeal. Consumers would be unprotected, and the DPUC would essentially be denied a meaningful appeal.

It is the principal contention of the State Movants that regulation of rates must remain in place during the transitional period as the wireless telecommunications market moves toward a more competitive basis in Connecticut sufficient to adequately protect consumers. In the absence of a stay, a successful appeal will be rendered largely meaningless inasmuch as the DPUC seeks only to continue regulation for a short period of time, much of which will be consumed during the litigation of an appeal of the Commission's Order. The lack of meaningful relief constitutes irreparable harm. The Commission should therefore stay its Order to ensure that the State Movants are not deprived of the very relief to which they claim they are entitled.

The effect of the Order is to deny the DPUC the authority to cellular rates. Without a stay, the carriers will be able to set rates free of DPUC oversight. The likelihood for serious irreparable harm exists first in that carriers will be able to set rates free of regulatory oversight, having a potential adverse impact on consumers. Indeed, it is the central issue at stake in the State Movants' appeal that present market conditions will not protect consumers in the absence of regulation. Moreover, if left to their own devices and free from rate regulation, the carriers' actions, the State Movants contend, could very well deprive

Connecticut of the very goal the Commission hopes to obtain with the introduction of PCS and other entrants -- a competitive wireless communications market. Without continued regulation, the existing carriers will have the potential to use their market power to the disadvantage of new entrants. However, the damage to a future competitive market may not be easily undone once the DPUC's regulatory authority is restored if it prevails on appeal.

Similarly, the lack of a stay will result in serious administrative problems if the State Movants are successful on appeal. To shift back and forth from a regulated and unregulated environment while the Order's legality is litigated is plainly not in the public interest and will result in irreparable harm to the State Movants and Connecticut consumers. Consumer confusion is likely to result with rates being unregulated and shortly thereafter reregulated. Moreover, the proper regulatory treatment of rates upon reregulation, assuming that the State Movants prevail on the merits, raises serious administrative problems itself. All this should properly be avoided by granting a stay.

Other parties will not suffer harm from the issuance of a stay of the Order. The effect of the stay would be to permit the DPUC to continue to regulate wholesale rates during the pendency of the appeal. In other words, a stay would preserve the status quo under which the parties have been operating and providing service. A stay will not result in any significant impairment to the other parties, particularly when contrasted with the harm that will be sustained by the State Movants and consumers in the absence of a stay.

The public interest will be best served by granting a stay. The issues presented by the DPUC's petition and the appeal of the Commission's Order are obviously of significant

public importance. The future development of a competitive market for wireless communications in Connecticut may very well depend on their outcome. Consumers are entitled to the protection of continued regulation of rates while these issues are litigated. Moreover, it would be a grave disservice to the public interest if the State Movants prevail on the merits of their appeal, yet consumers are left unprotected during the period in which the appeal is litigated. As discussed above, the DPUC has sought only a short, temporary extension of its authority to regulate rates in Connecticut. Without a stay, the DPUC will have by default lost much of what it seeks even if it ultimately prevails on appeal. Accordingly, the public interest requires the granting of a stay.

**CONCLUSION**

For the foregoing reasons, the State Movants request that the Commission stay its  
Order denying DPUC's petition until the resolution of their appeal.

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July 13, 1995

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This certifies that a copy of the foregoing was served by first-class mail this 13th day of July, 1995 to the following persons:

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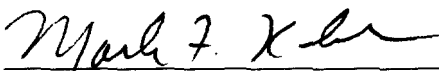
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